In the High Court of Judicature at Madras

Dated: 04.07.2007

Coram

The Honourable Mr.JUSTICE P.K.MISRA
and
The Honourable Mrs.JUSTICE R.BANUMATHI

Habeas Corpus Petition No.1245 Of 2006

Pusparaj .... Petitioner

Vs.

1.State of Tamil Nadu
rep. by its Secretary
Department of Home
Fort St. George
Chennai 9.

2.The Superintendent of Central Prison
Central Prison
Vellore 2. .... Respondents

PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Habeas Corpus, directing the Respondents to produce the detenu, viz., Pusparaj, S/o.Periyathambi, before this Court and set him at liberty.

For Petitioner : Mr.R.Sankarasubbu
For Respondents: Mr.M.Babu Muthu Meeran,
Addl. Public Prosecutor

O R D E R

(Order of the Court was made by R.BANUMATHI,J)

This is a Petition for issuance of a Writ of Habeas Corpus, questioning the legality of the continued imprisonment of the Petitioner.

2. The Petitioner, is a life convict, who was convicted u/s. 120-B, 365, 386 r/w. 34 & 302 r/w.34 I.P.C. and sentenced to death (u/s.302 r/w.34 I.P.C.), R.I. for 10 years (u/s.386 r/w. 34 I.P.C.) and R.I. for 7 years (u/s.365 I.P.C.) by the Sessions Court, Chennai, in S.C.No.227/94 on 27.11.1996. In C.A.No. 58/97, the High Court has confirmed the conviction and sentence awarded to the Petitioner. The sentence of death awarded to the Petitioner was subsequently commuted to imprisonment for life by the Supreme Court of India in

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C.A.Nos. 1234 to 1237/97.

3.The Petitioner has completed 13 1/2 years of actual sentence as on 01.03.2007. According to the Petitioner as he has served more than 10 years, he is eligible for release as per G.O.(Ms).No.873 Home (Prison IV) Department, dated 14.09.2006. The contention of the Petitioner is that excluding the Petitioner from the list of lifers eligible for remission under the said G.O. is arbitrary and unreasonable.

4.On the occasion of 98th Birth Day of Peraringnar Anna, in exercise of the powers conferred under Art.161 of Constitution of India, the Governor of Tamil Nadu, has remitted the unexpired portion of sentence of imprisonment for life passed on the 472 convicts, it would be appropriate to set out the G.O.Ms.No.873 dated 14.09.2006.

> "In the interest and welfare of the prisoners and on the occasion of the 98th Birth day of Peraringnar Anna, the Government have decided to release all life convicts, who had completed 10 years of actual imprisonment on 15.09.2006 subject to the following conditions:-
>
> i. That the prisoners, who are convicted for the offences specified in G.O.Ms.No.1762, Home, dated 20.07.1987 will not be eligible for this concession;
>
> ii. That their general behaviour in the prison should have been satisfactory;
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> iii. That the life of the convict would be safe if released;
>
> iv. That they would be accepted by the members of their families or any other social organisation which can give guarantee for the safety of their lives;
>
> v. That their cases do not come under Section 435 Cr.P.C.; and
>
> vi. That they will execute bonds, according to the usual terms and conditions."

On accepting the recommendation of Additional Director General of Prisons (hereinafter referred to as "ADGP"), the Governor has remitted the unexpired portion of sentence of imprisonment for life passed on the 472 convicts, as annexed in the said G.O.

5.The grievance of the Petitioner is that G.O.Ms.No.873 is an instance of general exercise of power of remission under Art.161 and while so, excluding the Petitioner from remission is unreasonable warranting interference. In the counter affidavit, it is averred that the ADGP has sent letter No.24974/PS1/2006 dated 08.09.2006 stating that the Petitioner and co-accused, who is another life convict,viz.,

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Muthu @ Muthuraman, were involved in sensational murder case of a 13 year old innocent boy and recommended not to consider their cases for premature release on en-masse release. Since, the Petitioner is involved in heinous offence, the non-inclusion of his name is in accordance with the principles and guidelines laid down by the Supreme Court.

6. The main contention of the Petitioner is that the G.O.Ms.No.873 is an instance of general exercise of power and power to remit the sentence has to be exercised by the Governor/ appropriate Authority in a fair and impartial manner adopting uniform parameters. As per G.O.Ms.No.873, "the prisoners, who are convicted for the offences specified in G.O.Ms.No.1762, Home, dated 20.07.1987 will not be eligible for the concession." The learned counsel for the Petitioner has vehemently contended that the Petitioner is not a prisoner convicted for the offences categorised in the said G.O.Ms.No.1762, so as to dis-entitle him. While so, excluding the Petitioner from granting remission as per G.O.Ms.No.873, is arbitrary.

7.For proper appreciation of contention of the Petitioner, we may usefully refer to G.O.Ms.No.1762 dated 20.07.1987, which reads as follows:-

> "In Para 17.2 of Chapter XX of its report, the All India Committee has recommended that the following categories of prisoners should not be eligible for consideration of premature release:-
>
> i. Prisoners convicted of rape, forgery, dacoity, terrorist crimes, offences against the State and prisoners sentenced under Sections 224, 376, 396 to 400, 402, 467, 471, 472, 474, 489A, 489B and 489 D of the Indian Penal Code;
>
> ii. Prisoners convicted of economic offences, black marketing, smuggling and misuse of power and authority; and
>
> iii. Prisoners sentenced under Prevention of Corruption Act, Suppression of Immoral Traffic in Women and Girls Act, Drugs Act and Prevention of Food Adulteration Act."

8.Concededly, the Petitioner was convicted u/s.120-B, 365, 386 r/w. 34 & 302 r/w.34 I.P.C. It was urged that the Petitioner not falling under any one of the excluded categories, ought to have been given the benefit of remission in G.O.Ms.No.873. It was further urged, the Government being the Sole Authority in advising the Governor, in exercise of the powers under Art.161 is bound to act in conformity with the provisions of Constitution and the principles underlying the policy of remitting the sentence of prisoners and ordering premature release.

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9.The learned counsel for the Petitioner has further argued that the manner, in which, the Government exercised its power of remission either under Sec. 432 Cr.P.C. or Art.161 of the Constitution, is open to challenge in a Court of law on the ground that the power has not been exercised in accordance with law or the principles of natural justice.

10.The learned counsel relied upon *Maru Ram case (AIR 1980 S.C. 2147)* and contended that every convict who has completed the prescribed period of sentence in prison is entitled in law to seek premature release and it is not open to government to say that the premature release of prisoners is an act of benevolence and no one is entitled to seek premature release as of right. Alternatively, the Counsel argued that even if the granting of remissions of sentences is a gesture of goodwill of the Government towards prisoners, who had reformed in jail, the Government must act in a fair, reasonable and uniform manner in exercising its powers of prerogative and the power should not be exercised in an arbitrary and capricious manner. It was also urged that any guidelines issued by the Human Rights Commission cannot govern or cripple the powers of the Government in exercising the power of remission either under Art.161 or Sec. 432 Cr.P.C.

11.Placing reliance upon (2006) 3 S.C.C. (Cri) 438 *(Epuru Sudhakar Vs. Government of Andhra Pradesh)* and 1989 S.C.C. (Cri) 86 *(Kehar Singh Vs. Union of India)*, the learned Additional Public Prosecutor has contended that the power to grant pardon and remission of sentence is essentially an Executive Function to be exercised by the Head of the State, after taking into consideration various matters. The learned Additional Public Prosecutor has further submitted that the nature of the offence and the Petitioner/life convict, being a Srilankan National, were all the factors taken note of by the executive for not enlisting the name of the Petitioner in the en-masse release. The learned Additional Public Prosecutor further urged that the order of granting remission essentially pertains to the proprietary of the order of the Executive in the matter of exercising power under Art.161, after the conviction/sentence passed by the Court and as such, it cannot be interfered with.

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12. G.O.Ms.No. 873 was the order passed in exercise of the powers conferred under Art.161. We shall first deal with the constitutional provisions regarding the grant of pardon and scope of judicial review in such matters. Under the Constitution the power to grant pardon etc. is vested in the President and the Governor of States. Art.72 deals with the former and Art.161 with the latter. Art. 72 provides that the President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence indicated in Art.72. Under Art.161 the Governor of State has

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the power to grant pardons, reprieves, respites or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends that is in respect of matters with respect to which the Legislature of the State has power to make law. Both Articles 72 and 161 give the widest powers to the President or the Governor of a State as the case may be and there are no words of limitation indicated in either of the two Articles.

13. In *Kehar Singh's Case (1989 S.C.C. (Cri) 86)*, the scope of exercise of power of President under Art.72 was considered by the Supreme Court and the Supreme Court has held as under:-

> " .....
>
> 10. We are of the view that it is open to the President in the exercise of the power vested in him by Art.72 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the Court in regard to the guilt of, and sentence imposed on, the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it.
>
> .....
>
> It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court. "

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14.Regarding the consideration to be applied to a Petition for grant of pardon/remission in *Kehar Singh case*, the Supreme Court has further held thus:-

> "...The manner of consideration of the Petition lies within the discretion of the President, and it is for him to decide how best he can acquaint himself with all the information that is necessary for its proper and effective disposal. The President may consider sufficient the information furnished before him in the first instance or he may send for further material relevant to the issues which he considers

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> pertinent, and he may, if he considers it will assist him in treating with the Petition, give an oral hearing to the parties. The matter lies entirely within his discretion. As regards the considerations to be applied by the President to the Petition, we need say nothing more as the law in this behalf has already been laid down by this Court in *Maru Ram*"

It is, therefore, manifest that while exercising the power of pardon under Art. 72 and 161, it must be exercised, keeping in view the intention of the Legislature and based upon the information furnished before the President/Executive.

15. It is fairly well settled that the exercise or non-exercise of pardon power by the President or Governor as the case may be is not immune from judicial review. Limited judicial review is available as has been consistently held by the Supreme Court. In *Maru Ram's case ((1981) 1 S.C.C. 107)*, the Supreme Court came to the conclusion that the power under Articles 72 and 161 can be exercised by the Central and State Governments and not by the President or Governor on their own. The advice of the appropriate Government binds the head of the State. The Court also came to the conclusion that considerations for exercise of power under Articles 72 or 161 may be myriad and their occasions protean, and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or malafide. Only in those rare cases will the Court examine the exercise. In Para 62 of the judgment in *Maru Ram case* the Court had observed:-

> "An issue of deeper import demands our consideration at this stage of the discussion. Wide as the power of pardon, commutation and release (Articles 72 and 161) is, it cannot run riot; for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course. Here, we come upon the second constitutional fundamental which underlies the submissions of counsel. It is that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power. We proceed on the basis that these axioms are valid in our constitutional order."

It was further held that the power to pardon, grant remission and commutation, being of the greatest moment for the liberty of the citizen, cannot be a law unto itself but must be informed by the finer canons of constitutionalism.

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16.In (1998) 4 S.C.C. 75 *(Swaran Singh Vs. State of Uttar Pradesh)*, one Doodh Nath was found guilty of murdering one Joginder Singh and was sentenced to imprisonment for life. His Appeals to the High Court and Special Leave Petition to Supreme Court were dismissed. However, within a period of less than 2 years the Governor of Uttar Pradesh granted remission of the remaining long period of his life sentence. The Supreme Court quashed the said order of the Governor on the ground that when the Governor was not posted with material facts, the Governor was apparently deprived of the opportunity to exercise the powers in a fair and just manner. Observing that the order of the Governor fringes on arbitrariness. The Supreme Court has held that, "...if the pardon power was exercised arbitrarily, malafide or in absolute disregard of the finer canons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it..." . The Supreme Court further observed that when the order of the Governor is impugned, it is subject to judicial review within the strict parameters laid down in *Maru Ram case* and reiterated in *Kehar Singh case*.

17. In (2000) 5 S.C.C. 170 *(Satpal Vs. State of Haryana)* the Supreme Court has held that the power of granting pardon under Art. 161 is very wide and does not contain any limitation as to the time at which and the occasion on which and the circumstances in which the said powers could be exercised and held as under:-

> "....
> But the said power being a constitutional power conferred upon the Governor by the Constitution is amenable to judicial review on certain limited grounds. The Court, therefore, would be justified in interfering with an order passed by the Governor in exercise of power under Article 161 of the Constitution if the Governor is found to have exercised the power himself without being advised by the Government or if the Governor transgresses the jurisdiction in exercising the same or it is established that the Governor has passed the order without application of mind or the order in question is a mala fide one or the Governor has passed the order on some extraneous consideration...."

18. Reiterating permissibility of the judicial review of the order of the President or the Governor under Art. 72 or 161, as the case may be, and referring to various case laws in *Epuru Sudhakar case* ((2006) 3 S.C.C. (Cri) 438), Justice Arijit Pasayat, has laid down the following grounds for judicial review:-

> "(a) that the order has been passed without application of mind;

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(b) that the order is malafide;
(c) that the order has been passed on extraneous or wholly irrelevant considerations ;
(d) that relevant materials have been kept out of consideration ;
(e) that the order suffers from arbitrariness."

19. So far as desirability to indicate guidelines is concerned, in *Epuru Sudhakar Case*, referring to *Ashok Kumar case ((1991) 3 SCC 498)*, it was held as follows:

"17.In *Kehar Singh case* on the question of laying down guidelines for the exercise of power under Article 72 of the Constitution this Court observed in Para 16 as under:

"It seems to us that there is sufficient indication in the terms of Article 72 and in the history of the power enshrined in that provision as well as existing case-law, and specific guidelines need not be spelled out. Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines, for we must remember that the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme."

These observations do indicate that the Constitution Bench which decided *Kehar Singh case* was of the view that the language of Article 72 itself provided sufficient guidelines for the exercise of power and having regard to its wide amplitude and the status of the function to be discharged thereunder, it was perhaps unnecessary to spell out specific guidelines since such guidelines may not be able to conceive of all myriad kinds and categories of cases which may come up for the exercise of such power. No doubt in *Maru Ram case* the Constitution Bench did recommend the framing of guidelines for the exercise of power under Articles 72/161 of the Constitution. But that was a mere recommendation and not a ratio decidendi having a binding effect on the Constitution Bench which decided *Kehar Singh case*. Therefore, the observation made by the Constitution Bench in *Kehar Singh case* does not upturn any ratio laid down in *Maru Ram case.* Nor has the Bench in *Kehar Singh case* said anything with regard to using the provisions of Section 433 Remission Rules as guidelines for the exercise of the clemency powers.

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37. In *Kehar Singh case* this Court held that:

"There is also no question involved in this case of asking for the reasons for the President's order."

20. Bearing in mind the parameters of judicial review in relation to grant of pardon by the Governor, when we examine the present case, the order of exclusion of Petitioner from the benefits cannot be said to be non-application of mind or malafide. It is noticed that the ADGP had sent letter No. 24974/PS1/2006 dated 08.09.2006 stating that the Petitioner and co-accused were involved in sensational murder case of a 13 years old innocent boy in a brutal manner and recommended not to consider their cases for premature release on en-masse release.The Government seems to have taken note of the offence and the back ground of the Petitioner and co-accused in not considering their case for premature release on en-masse release and therefore, it cannot be said to suffer from arbitrariness. It cannot be said that the irrelevant and extraneous materials entered into the decision making process in excluding the Petitioner from getting remission as per G.O.Ms. 873. The contention that the Petitioner was discriminated is unacceptable.

21. On the recommendations of the concerned Authorities, it is for the Governor to grant respites or remissions of punishment or commute the sentence . In a Habeas Corpus Petition, the High Court cannot issue any direction directing the State Government to release the Petitioner. In AIR 2000 SC 2762 *(Laxman Naskar Vs. State of West Bengal)*, the Supreme Court has held that "the appropriate Government has the undoubted discretion to remit or refuse to remit the sentence and where it refuses to remit the sentence no writ can be issued directing the State Government to release the prisoner."

22. Relying upon the decision in 1983 L.W. (Cri) 321 *(R.Ragupathy-Petitioner)*, the learned counsel for the Petitioner contended that before exercise or non-exercise of powers by the Executive, the Petitioner must be afforded an opportunity to make his representation before passing the final order. In the said case, the Division Bench of this Court considered the manner regarding which the power of remission is to be exercised under Sec. 432, 433 Cr.P.C. subject to the limitation under Sec. 433 A and the Court has laid down certain guidelines. The Division Bench has further held that in such of those cases, where the Government is not inclined to grant premature release, the Government, should not only set out its reason, but also must give an opportunity to the affected persons to make their representation before passing final orders.

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23. In the present case, the impugned Government order was passed in exercise of clemency power under Art. 161. Insofar as the exercise of power under Art. 72 or Art. 161, there is no right for the prisoner to insist on an oral hearing before the President/Governor. The proceeding before the President/Governor is of an executive character. When the convict files his Petition, it is for him to submit with it all requisite information necessary for disposal of the Petition. He has no right to insist on presenting an oral argument. The manner of consideration of the Petition lies within the discretion of the President/Governor. In exercise of powers under Art. 72 and Art.161 the Petitioner has no right of personal hearing. Hence, the Petitioner cannot complain of violation of guidelines issued in the decision cited supra.

24.Though, the case of the Petitioner and co-accused for premature release under general amnesty ordered in G.O.Ms.No.873 dated 14.09.2006 were excluded. In Para 6 of the counter affidavit, the Government has stated that the case of the Petitioner would be considered for release under Advisory Board Scheme, as per Rule 341(2) of Tamil Nadu Prison Rules 1983 after following the usual procedure and necessary action would be taken up by the Second Respondent in due course. Having regard to such statement made in the counter affidavit, we deem it fit to direct the Petitioner to file a fresh representation for consideration for remission under Sections 432 and 433 Cr.P.C.

25. The Petitioner is directed to file a fresh representation to the Government for remission under Sections 432 and 433 Cr.P.C. On receiving such representation, the Respondents are directed to consider the same in accordance with Rules and dispose of the same within a period of four weeks from the date of receipt of a copy of this order. It is made clear that such representation shall be considered without being influenced by any of the views expressed in this order or by the earlier rejection order.

26. This Habeas Corpus Petition is disposed of accordingly.

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Sub Asst.Registrar

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To

1.The Secretary
State of Tamil Nadu
Department of Home
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Chennai 9.

2.The Superintendent of Central Prison
Central Prison
Vellore 2.

+1cc to Mr.R.Sankarasubbu, Advocate SR 40172

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km/18.7.

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